I.

The situation in the Philippines.

There was not an ordinary revolt or mere insurrection; it was settled and serious rebellion. It was civil war so far as extent and duration are concerned. For a statement of the distinctions see sec. 10, Lieber's Instructions for the Government of our Armies in the Field. The Philippine insurrection was flagrant and widespread; it was rebellion, perhaps, rather than civil war, because those peoples in a remote territory had just come under our sovereignty and turned against the new dominion their existing revolution against Spain as soon as they realized that we would not be complaisant.

It is of no consequence that the warfare lulled at times and at one intervening period seemed to the commanders to be nearing the end; there was immediate renewal, and it was perceived through long experience that, defeated in masses and open engagements, the *insurrectos* deliberately systematized guerilla warfare. Not until after the formal declaration of the end of the insurrection did hostilities die out in sporadic instances of ladronism or brigandage. The facts are found and are irresistible. Indeed, they are patent to the knowledge of all as part of history. The court will take judicial notice of such events. (*Brown* v. *Piper*, 91 U. S., 37; *The Delaware*, 161 U. S., 472; *New York Indians* v. *United States*, 170 U. S., 32; *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S., 698.)

Whatever expressions may be found in reports showing the satisfaction of the Executive at the progress and prowess of our arms and the consequent gradual extension of civil government under the military authorities, it is certain from the public documents before the court and acts of Congress voting men and supplies, passed long prior to the express recognition in the Spooner amendment and the statutes of 1902, that both the Executive and legislature at all times realized and determined that war existed. A state of war prevailed and the exercise of the war power was necessary.

II.

The question and its limits.

The question is whether the duties exacted under the Executive order on imports into the Philippines from the United States are valid. There can be no doubt that they are for the period up to the ratification of the treaty with Spain, on the authority of *Dooley* v. *United States* (182 U. S., 222). Beyond that date the test is not whether the territory was domestic, but whether it was hostile. We insist that the territory being hostile in the real sense and flagrant degree which are notorious, the tariff was not only justifiable but was necessary as a war measure. We do not disparage our own title, and we do not come within the rule of the Diamond Rings case. There are essential differences between that duty on an importation *from* the domestic territory *into* the United States and a duty on an importation *into* that territory *from* the United

States. In the one case the war power was not involved. It was not even invoked. The Government's argument simply was that war prevailing, this fact rightly characterized the Philippines as foreign within the meaning of our tariff laws. In the present case it is the Philippine tariff which is presented resting on military necessity. Here we have the war power providing revenue, in and for the territory of occupation, for attaining its object, viz, suppression of resistance and the maintenance of civilized government. While the right to exact military contributions controls the case, these were not military contributions in the ordinary sense. They were not exactions for the benefit of this Government; they were not paid into the Treasury of the United States, but, on the contrary, vast appropriations came out of that Treasury to serve the same object. The Philippine collections went into the military chest not only to support our armies in the field and conduct campaigns, but to maintain the existing and steadily extending machinery of civil government. We disturbed what we found as little as possible and only so far as war compelled, and so through the various minor modifications of our military tariff and port regulations we continued substantially the Spanish tariff and system which we inherited. On the same theory we reestablished the previous civil order of administration and jurisprudence as fast as we overcome the warfare against us, and displaced the Philippine revolutionary civil government. This was in strict accordance with

the settled principles of international law. This was what the duties were needed for.

I submit that the Dooley case and the Diamond Rings case do not rule the present controversy, and, indeed, do not really touch it.

III.

The extent and nature of the executive authority; military contributions; commercial intercourse with hostiles; sovereign and belligerent powers; the controlling authorities.

The power of an executive government in the field is very absolute. It may totally forbid all commerciel intercourse or restrict it; it may exact contributions as idemnity, and of course to defray current expenses. The civilized way of doing so is by tariffs, as here, or other ordinary dues which are devoted to the military needs and the civil administration of the country. The executive may exact conditions for trading with a hostile territory. Importation under such circumstances is not a right but a privilege, which may be exercised only upon the conditions imposed. These are well-settled rules recognized by all the authorities. In the absence of statute, in our own case, the regulation and collection of such revenues devolves upon the President as Commander in Chief (2 Halleck Int Law, 3d ed., pp. 445–449). Halleck says:

> In the absence of any laws of Congress on this subject, the regulating and collecting of such revenues in enemy's territory in the possession of the United States devolves upon the

> President, as the constitutional Commander in Chief, and upon the military and naval officers under his direction. The moneys derived from these sources may be used for the support of the ~~military~~ government of the conquered territory or for the expenses of the war; they are war revenues and do not belong to the Treasury of the United States until so directed by a law of Congress. Being no part of the moneys of the Treasury of the United States, their expenditure is not regulated by the general laws of the United States, but by direction of the President of the United States, under whose authority they were collected.

These doctrines apply equally to foreign and civil wars. (*Matthews* v. *McStea*, 91 U. S., 7; 1 Kent's Com., p. 66; 1 Halleck Int. Law, p. 527.)

In *Matthews* v. *McStea*, speaking of the established rule that war puts an end to all commercial dealing between the citizens or subjects of the powers at war, the court said:

> Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. * * * Equally with foreign war, it renders commercial intercourse unlawful between the contending parties.

The authority of the President to prohibit entirely all commercial intercourse with territory affected by the insurrection without the prior assent of Congress was upheld in many cases arising during the civil war. If the President may wholly forbid such intercourse, it

can not be doubted that he may permit it under such restrictions and regulations as the exigencies of the particular situation may require.

The following decisions uphold the right of the Federal authorities to regulate or restrict trade with domestic territory in which a condition of war prevails as a result of insurrection: *United States* v. *Grossmayer*, 9 Wall., 72; *Hanger* v. *Abbott*, 6 Wall., 532; *McKee* v. *United States*, 8 Wall., 163; *The Prize Cases*, 2 Black, 635; *Hamilton* v. *Dillin*, 21 Wall., 73; *The Reform*, 3 Wall., 617; *The Sea Lion*, 5 Wall., 630; *The Ouachita Cotton*, 6 Wall, 521; *Coppell* v. *Hall*, 7 Wall., 542; *Mrs. Alexander's Cotton*, 2 Wall., 404.

In the *Prize Cases* the court sustained the right of the President during the civil war to institute a blockade of ports of the insurgent territory without the consent of Congress, holding that a state of war existed which would justify a resort to this means:

> Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance * * * as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the Government to which this power was intrusted. He must determine what degree of force the crisis demands (2 Black, 670).

In *Hamilton* v. *Dillin* (21 Wall., 73), which involved certain regulations adopted by the President regarding

trade between the rebels and loyal States during the civil war, the court said (p. 97):

> The power of the Government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the Government of the United States as incident to the power to declare war and to carry it on to a successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government, just as much so as the power to levy military contributions, or to perform any other belligerent act.

In that case the action of the Executive was based upon an act of Congress authorizing the President in his discretion to permit intercourse with the insurrectionary States, to be conducted in pursuance of regulations prescribed by the Secretary of the Treasury. The court therefore found it unnecessary to decide whether, in the absence of Congressional action, such power might be exercised by the President alone, but remarked, "It would seem that little doubt could be raised on the subject" [citing *Cross* v. *Harrison*, 16 How., 164, 190; *Leitensdorfer* v. *Webb*, 20 How., 176; *The Grapeshot*, 9 Wall., 129]. Other cases cited below make it clear that the war power embraces, whenever

necessary, the authority to raise revenue by imposing taxes.

The case of *Lamar* v. *Browne* (92 U. S., 187), involved the right of the military forces to capture certain property in the insurgent territory. In denying the right of plaintiff to recover, the court said (p. 193):

> It is contended that, when seized, it was not in "hostile possession," and that, in consequence, the seizure, though made by the military, did not amount to a capture. It is true, as claimed, that, when the seizure was made, active hostilities in Georgia had entirely ceased. The last organized army of the rebellion east of the Mississippi had surrendered almost two months before, and a very large portion of the national forces had been disbanded. The blockade had been raised, and trade and commercial intercourse in that part of the insurgent territory again authorized; but still, in fact, a state of war existed. That continued until April 2, 1865 (*The Protector*, 12 Wall., 702); the territory within the limits of the State of Georgia being occupied by the national forces, and actually governed by means of that occupation * * *
>
> It is quite true that the United States, during the late war, occupied a peculiar position. They were, to borrow the language of one of the counsel for the plaintiff, both "belligerent and constitutional sovereign;" but, for the enforcement of their constitutional rights against armed insurrection, they had all the

> powers of the most-favored belligerent. They could act both as belligerent and sovereign. As belligerent, they might enforce their authority by capture; and, as sovereign, they might recall their revolted subjects to allegiance by pardon, and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose. It was a matter entirely within their sovereign discretion (p. 195).

The language just cited is particularly applicable to the position of the United States with respect to the Philippine Islands during the period under consideration. The United States possessed all the rights of a belligerent, acting both in that capacity and as sovereign (see, also, Bouvier, title "Law;" *Mrs. Alexander's Cotton*, 2 Wall., 404, 419; *Rose v. Himely*, 4 Cr., 241, 272); they could permit free commercial intercourse with the hostile territory, or impose thereon such restrictions or conditions as were deemed necessary and proper, or they could prohibit trade and commerce with the enemy altogether if they chose. It was, as the court said in Lamar *v.* Browne, "a matter entirely within their sovereign discretion."

On this point the Court of Claims in the Warner, Barnes case said:

> If a state of war existed in the Philippine Islands, did that ipso facto justify the exaction of the tariffs that were collected? That such war did exist before and after the exchange of ratifications of the treaty with an armed military power in said islands is beyond dispute. * * *
>
> In time of war, within the military district of

> its operation, no restrictions are placed upon the power and authority of the military commander, except such as are imposed by the common consent of all civilized people. His power is absolute within the radius of his jurisdiction. He may prohibit or restrict all trade or commerce within his lines. * * *
>
> The tariffs paid by the plaintiff were not levied or collected by virtue of the general statutes of the United States relative to customs, nor by authority of any general law, nor in the exercise of the civil powers of the Government, the latter never having been in force in consequence of the prevailing war throughout said islands; but such tariffs were collected solely as a military contribution, exacted by the military government, and as a condition annexed to the privilege of importing goods upon which the duties were levied.

In *New Orleans* v. *Steamship Co.* (20 Wall., 393) it was said:

> Although the city of New Orleans was conquered and taken possession of in the civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that Government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right * * * to assume to such extent as it may deem proper, the exercise by itself of

> all the powers and functions of government. * * * It may prescribe the revenues to be paid, and apply them to its own use or otherwise. * * * There is no limit to the powers that may be exerted in such cases, save those which are founded in the laws and usages of war. * * * In such cases the laws of war take the place of the Constitution and laws of the United States as applied in times of peace.

It is contended that whatever may have been the condition of other portions of the Philippine Islands, at least Manila was at all times during the exactions complained of in the complete and peaceable possession of the United States, and therefore was not hostile territory in which war measures could be enforced. The answer to this is that the political status of Manila must be held to be that of the Philippines generally; that that port was impressed with the state of war prevailing in the islands and could not be distinguished for customs purposes from the remaining territory. The cases already cited are ample authority for this view.

In *Hamilton* v. *Dillin* (*supra*) it was claimed that Nashville, being within the national lines, was not hostile territory at the time the cause of action arose, and therefore not within the prohibition of commercial intercourse. The court held that inasmuch as Tennessee was named in the President's proclamation as one of the States in insurrection, the city of Nashville was affected by the status of the State and accordingly was to be considered hostile.

> The further provision * * * that all commercial intercourse with the insurrectionary districts should cease "so long as such condition of hostility shall continue," could not be construed as allowing such intercourse to be resumed by individuals at will, as fast and as far as our armies succeeded in occupying insurgent territory. The "condition of hostility" remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war (p. 95). * * *
>
> But it is unnecessary to pursue this subject. We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President (p. 96).

In *Lamar* v. *Browne* (*supra*) plaintiff endeavored to recover the value of certain cotton seized by the military forces of the United States at Thomasville, Ga., on the ground that when seized the property was not in "hostile possession," active hostilities in Georgia having ceased. The court held as follows (pp. 193–194):

> From time to time during the war the military lines of the enemy were forced back, and, as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken out of hostile possession. Whenever, therefore, during this military occupation, enemy property found on the recovered territory was seized by the military forces, in obe-

> dience to orders, it was taken from hostile possession within the meaning of that term as used in respect to captures. Property taken on a field of battle is not usually collected until after resistance has ceased, but it is none the less on that account captured property. The larger the field, the longer the time necessary to make the collection. * * * For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies.

To the same effect is the case of *Mrs. Alexander's Cotton* (2 Wall., 404) where it was said (p. 419):

> It is said that, though remaining in rebel territory, Mrs Alexander has no personal sympathy with the rebel cause, and that her property therefore can not be regarded as enemy property; but this court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

The authority of the President to issue the order of 1898 is established conclusively by the authorities already cited. His power to exercise that authority did not cease upon the ratification of the treaty of

peace, but continued throughout the whole period during which hostilities prevailed, and until Congress acted. An insurrection of such proportions as to require the employment of a large army for the purpose of suppressing it existed in the Philippines both before and for some years after the ratification of the treaty, and the treaty could not, accordingly, become effective there, as a treaty of peace, by reason of these conditions. As was said by the Court of Claims in the Warner, Barnes case:

> At the time the ratifications of the treaty of peace were exchanged, the treaty had thereafter the force of law, but by reason of the war existing in the islands at the time, it failed to become effective, and it, as well as all other merely civil law, was suspended and superseded by military law, until such time as it might be possible to put the treaty and civil law in force, and establish proper administrative and judicial authorities to administer and enforce the same. The vital point is that until the military forces of the United States had suppressed armed resistance against its authority and established its sovereignty in the islands, the Government could not give the effect to the treaty contemplated by the high contracting parties.

In *Leitensdorfer* v. *Webb* (20 How., 178), the question was raised whether the institutions of the provisional government established in New Mexico after its conquest, by the Executive authority of the United States, were terminated by the termination of the belligerent attitude of the parties, thus reviving and rees-

tablishing the previous institutions of the vanquished power. The court held to the contrary, saying:

> The ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress or by that of the Territorial government in the exercise of powers delegated by Congress

In *Hamilton* v. *Dillin* (*supra*) the court said:

> In *Cross* v. *Harrison* (16 How., 190) it was held that the President, as commander in chief, had power to form a temporary civil government for California as a conquered country, and to impose duties on imports and tonnage for the support of the Government and for aiding to sustain the burdens of the war, which were held valid until Congress saw fit to supersede them; and an action brought to recover back duties paid under such regulation was adjudged to be not maintainable (p. 87).

In other words, a treaty of peace can not operate instantly to supplant executive acts and orders when, because of any paramount necessity, like the condition of war in the Philippines, that result should not follow. Indeed, in *Leitensdorfer* v. *Webb* and in *Cross* v. *Harrison*, as commented on in *Hamilton* v. *Dillin*, there was no such paramount necessity, and yet the provisional institutions of civil government and the war tariff continued until Congress authorized their displacement. But of course the *Dooley* case makes it now clear that unless there is a paramount necessity, such as contin-

ued warfare and rebellion, war dues can not survive ratification of a treaty of peace.

Opposing counsel rely greatly on a statement in illustration in the *Dooley case* (182 U. S., 222) that "while a military commander during the civil war was in occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country." But the court also said immediately following that "his power to administer would be absolute, but his power to legislate would not be without certain restrictions; in other words, they would not extend beyond the necessities of the case."

I do not understand that the court meant to say that the necessities might not have extended that far in our civil war. They did not, for various reasons. The enemy were not drawing their supplies from the Northern States. Cargoes were not coming in from the seceded States. The supplies and munitions were coming from abroad. There was no traffic of moment between our citizens, whether loyal or disaffected, in southern ports occupied by us, with the enemy. They were not acting there as factors and bankers for the hostiles. The Executive did not deem duties on merchandise from the loyal portions of the country necessary. Nor do I understand that the court by that illustration meant to forecast and cover the present case. Very different was the situation in the Philippines from the case of the Southern Confederacy. In the Philip-

pines the necessity did exist, and the illustration falls as a precedent, or rather itself contains the exception. Further, there is this vital distinction: The Philippines were merely territory of the United States, just acquired in law and not yet completely brought under the dominion of the United States. However true it may be that a particular southern port might have escaped just as far from our previous dominion, nevertheless it was situated in a "State" which was part of "an indestructible Union composed of indestructible States." There is certainly a difference in principle on the question—in fact, and legally and constitutionally—between new and distant territory, strange problems and unfamiliar conditions, on the one hand, and an integral section of the United States on the other. The latter lay at our doors, was really part of us; Congress, as well as the Executive was exercising its own power direct and was legislating constantly for the prosecution of the war. The legislature was in immediate touch with all the conditions, and did not need, as was the case here, to commit or leave untrammeled to the Executive's instant knowledge and power of prompt action the conduct of operations. In the civil-war case neither the Executive nor Congress deemed it necessary to erect the tariff barrier against trade from the loyal States. I do not hereby suggest the argument *ab inconvenienti;* the entire superstructure is the war power and the war necessity.

Another point is to be regarded in this connection. The Court of Claims finds as a fact that one form of aid to the insurrection was contraband trade between merchants and traders in Manila and the insurgents outside, in the course of which contributions were levied upon such trade by the officers of the insurgent government and paid by the agents of such traders. The record before this court does not disclose what the fact was in this respect relative to the claimants here, but it is well known that such houses occupy peculiar relations in the eastern trade and are factors and bankers for all the staple industries as well as mere merchants. It is notorious, and various public investigations and records show, that in such ways the insurgents supported their military operations and their revolutionary civil government, which was *imperium in imperio*. This fact illustrates sharply why tariffs and port and other regulations were a part of the military necessities. In this way our authorities controlled intercourse, knew what the shipments were, and to whom they were delivered, and traced all sorts of correspondences with the hostile forces. The United States recognized the existence of the insurrection, of course. It did not recognize an independent power at war; it did not treat the Filipinos as belligerents in the strict and technical meaning of international law, but in practice it accorded belligerent rights; it treated prisoners taken as prisoners of war, and in other ways proceeded toward them as warring and rebellious people, but not as conspirators and

traitors. It may well be that among the claimants who are interested in the pending issue there were those who might in strictness have been dealt with as disloyal inhabitants and traitors engaged in treacherous correspondence with the enemy. If so, they were merely taxed to support our Government and to restrain their unlawful activities. It would be strange if such people, giving aid and comfort to the enemy and collecting these imposts, of course, from the people who consumed their merchandise, by addition to the price, can turn round and demand from the Government with any reason or legal force, the return of these moderate and proper duties. The finding of the Court of Claims implies clearly that this situation existed. If there are among any of the pending demands cases of that sort, then there never was a stronger illustration of seeking to "make the worse argument appear the better," and such claims would be sheer effrontery.

IV.

Ratification by Congress.

If any doubt exists as to the validity of the action taken by the executive in enforcing customs duties in the Philippines, the subsequent approval and ratification thereof by Congress in the "Spooner amendment" and the act of July 1, 1902, must be held as having fully legalized such action.

It is plain that the necessity of the exercise of the war power was as great at least as in the war with Spain. The insurgent hostilities were altogether more extensive and formidable and were of much longer

duration. The attitude of the legislature in approving the executive action under the circumstances is evidence that Congress united with the executive in the opinion that under the prevailing conditions the military government was legal and necessary.

In the *Prize Cases* (*supra*) it was said (p. 670):

> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861. * * * And finally * * * we find Congress "*ex majore cautela*," and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President," etc., as if they had been issued and done under the previous express authority and direction of the Congress of the United States.
>
> Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well-known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. * * *
>
> The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source can not be received as authoritative in a tribunal administering public and international law.

And in *Hamilton* v. *Dillin* (*supra*), in discussing the effect of an act of Congress upon certain regulations made by the Secretary of the Treasury and approved by the President, relating to a tax upon cotton purchased in territory affected by the hostilities of the civil war, the court held that the act recognized and confirmed the regulations in question; that it was "clearly an implied recognition and ratification of the regulations, so far as any ratification on the part of Congress may have been necessary to their validity."

The cases actually before the court claim only on duties levied up to the date when the Philippine Commission, adopting and establishing the existing tariff, took effect. (Act of September 17, 1901, taking effect November 15, 1901; 1 Pub. Laws Philippine Com., p. 581.) That act was passed pursuant to authority under the President's instructions of April 7, 1900, and the Spooner resolution of March 2, 1901. The first transferred, after September 1, 1900, "that part of the power of government which is of a legislative nature" from the military governor to the Commission, including "the raising of revenue by taxes, customs duties, and imposts." The second (31 Stat., 895, 910) provided that "all military, civil, and judicial powers necessary to govern in the Philippine Islands * * * shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct."

One of the briefs before the court, however, challenges the authority, even at the stage of the Philippine Commission's act, and contend that the act of Congress of March 8, 1902, merely enacted a Philippine tariff for the future, and that the act of July 1, 1902 (32 Stat., 691), could not legally validate what the executive and its agencies had previously done. The act of March 8, 1902 (32 Stat., 54), provided that the tariff act of the Philippine Commission "shall be and remain in full force and effect," and that there shall be levied upon all articles coming into the Philippines from the United States the same duties which are required on articles from foreign countries. The act of July 1, 1902, (32 Stat 691) ratified the action of the President in creating and empowering the Commission; ratified his exercise of the war power in imposing a tariff, and approved (which is the same as ratified) the acts of our officers in pursuance thereof (sec. 2); and provided that whenever the "existing insurrection" should cease, and complete peace be established, and that fact should be certified to the President by the Commission, a census shall be taken, etc. (sec. 6). The fact of peace was declared in an order of the Secretary of War of July 4, 1902, and the President's proclamation of peace and amnesty was issued on the same day. The military government totally ceased on that day. Later, the fact that "a condition of general and complete peace has been established" was certified by the Commission, in accordance with section 6 of the act of July 1, 1902, by a resolution dated September 8, 1902.

The controlling considerations in this controversy—the original power of the President, the authority of the Commission, the grant of continued power by the Spooner amendment and the complete validation of the Executive action, and especially the laying of a tariff, by the later acts of Congress—cover the entire situation, and we argue that the duties were validly imposed up to the date March 8, 1902, when Congress itself specifically imposed them.

This is not a case of unauthorized delegation of legislative power. The grant is of all *military, civil, and judicial* power necessary to govern; the ratification is of the *action* of the President whereby duties were collected. The action here was the continuing of existing laws in force, for necessary purposes, which international law requires until new laws are constitutionally substituted. Both the grant and the ratification plainly recognize that the *military* situation along with the *civil* and *judicial* necessities of administration demanded the course pursued; there is no unconstitutional delegation. The President's authority originally embraced all branches of governmental power. He did not really legislate when he imposed a tariff; he said that import duties should continue to be collected. He *did* something; he exacted taxes by his order and his officers as Commander in Chief. Congress legislates, of course, when it passes a tariff act. It legislated thus for Porto Rico by the Foraker Act and for the Philippines by the act of March 8, 1902. Congress might have legislated on this subject on April 11, 1899, but

it did not choose to do so. It knew that the time and conditions were not fit—war prevailed. The maxim fully applies, "*Inter arma leges silent.*" The modern reading is that the military commander does not transgress law, but enforces existing law as his own. The intervening grant and the final ratification authorized and approved the President's acts within the rule. Congress, where it might have accomplished the result by its *legislation*, can ratify by legislation what was *done* without legislation.

I have cited the cases in this court as to ratification by Congress in an equivalent situation. I submit that they rule the controversy. A more extended examination of cases involving municipal instances where the war power did not enter confirms the principle. In general, they were cases where a public officer or municipal body who could not legislate took some action without previous authority. The test always is: Does the legislative body or other agency of government which ratifies possess authority to do the act, or to confer power to do it, in the first instance. (*Marsh* v. *Fulton Co.*, 10 Wall., 676; *Norton* v. *Shelby Co.*, 118 U. S., 451; *Sykes* v. *Mayor*, 55 Miss., 137, quoted with approval by this court in *Grenada Co.* v. *Brogden*, 112 U. S., 261; *Brown* v. *Mayor*, 63 N. Y., 239; *State* v. *Torinus*, 26 Minn., 1; *McMillan* v. *Boyle*, 6 Ia., 304.)

In *Mattingly* v. *District of Columbia* (97 U. S., 687) the court says that Congress, in legislating for the District of Columbia, may cure irregularities and vali-

date proceedings which, without this confirmation, would be unauthorized, and approves Judge Cooley's rule (Const. Lim., 371), viz: "If the thing wanting or which failed to be done and which constitutes the defect in the proceeding is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." There are innumerable other authorities to the same effect, for example, *Thomson* v. *Lee County*, 3 Wall., 327; *Campbell* v. *Kenosha*, 5 Wall., 194; *Supervisors* v. *Schenck*, 5 Wall., 772; *Gelpcke* v. *City of Dubuque*, 1 Wall., 175, 202; *Fleckner* v. *United States Bank*, 8 Wheat, 338, 363. It is not necessary to accumulate authorities by citing the long list of State cases.

In the case at bar the question is, did Congress possess authority, after the ratification of the treaty, to impose customs duties on goods entering the ports of the Philippine Islands from the United States? This question must of course be answered in the affirmative. (*Downes* v. *Bidwell*, 182 U. S., 244.) We are undoubtedly within the maxim that every subsequent ratification has a retroactive effect, and is equivalent to a prior mandate.

We stand on the war power coping with a flagrant state of war. Under such circumstances the Executive possesses the right to exercise legislative power until the war is over and so far as that power was exercised here, authority from Congress and ratification were not needed. The ratification, however, is complete

and is legally potent because it seizes the Executive action or legislation (valid certainly theretofore) at the point where Congress might have intervened (April 11, 1899), and approves and adopts it as continuing in force. Congress does not delegate its own legislative power or ratify, as a delegation, the legislative power exercised, but approves and confirms the exercise by the Executive of his own legislative power. Suppose Congress, on April 11, 1899, had passed an act declaring that the Philippine military tariff should continue in force until Congress should otherwise provide, as was done, substantially, on March 8, 1902. There can be no doubt whatever that until April 11, 1899, the military tariff was constitutionally imposed. Can it be doubted that Congress could do that? Such action would be legislation and would constitutionally authorize the President, not to legislate, but to continue to act. What more is needed to show that the ultimate act of ratification legitimately related back and affected the situation in precisely the same way? It did what Congress might have done when the treaty was ratified, and turned by the legislative approval the valid power of the executive to legislate up to that time into the equally valid power of the executive to continue to execute in accordance with that legislation. The argument that the Spooner amendment is unconstitutional because it is an attempt to delegate legislative power contrary to law, and that the ratification of 1902 is ineffective on the same ground because Congress can not approve what it can not authorize,

is contrary to a guiding principle of interpretation, viz, that all the presumptions are in favor of the constitutionality of a law. It is not to be supposed that the eminent constitutional lawyers in Congress, when this legislation was enacted, were not aware of the rule that Congress may not lawfully delegate legislative powers to the Executive. It must be assumed that the Spooner amendment was not an attempt to effectuate any such invalid purpose, but, on the contrary, was intended to have legal and constitutional effect. By reading it according to its natural meaning and the plain and sensible canons, in the light of all the facts before Congress, the true construction is that it is a legitimate ratification and approval of the course of the Executive in recognizing a state of war as existing in the Philippines and in dealing with it accordingly.

If the Executive can not do what was done, when we are at war and the necessities are so vital, and the joinder and approval of Congress have no effect, then we are indeed impotent as a nation. The constitutional authorities are acting together and in harmony, yet before a rebellion may be suppressed and anarchy averted all details of revenue and administration must be referred back to Congress, 10,000 miles away, in session only a portion of the time; formal war must be declared, and every step taken must be prescribed and authorized by a statute in advance. It is no answer to say that we could do all that was done except levy duties on imports from this country. Revenue

and strategical demands alike may have designated those duties as the most important. That is for the commander to determine. If the tariff from American imports must fall in such case, all might go. We are under obligation to Spain to treat her ships and goods like our own, and other nations would then have invoked the most-favored-nation clause. It is not arguing from inconvenience or hypothetical calamities to say that whether we choose or no we may be in a similar situation again. Where there are two possible constructions, one producing unreasonable or pernicious results, that one is to be avoided if consistent with reason. I do not believe we are so helpless. Certainly the Constitution was never intended to leave the national power in war and other emergencies so cramped and bound. I do not think it can be construed to have that result.

V.

CONCLUSION.

Some other points which have been made have already been sufficiently answered or are of minor importance. There can be no doubt that in territory subject to military occupancy civil affairs may be administered by civilian officials without diminution of the authority derived from the laws of war. That is a familiar rule of international law, and means that so far as possible the existing civil agencies and officers of government should be continued. Actual government under such circumstances is usually

administered directly by military authority, but it may also be administered by civil authority supported more or less directly by military force. (*Thorington* v. *Smith*, 8 Wall., 7; *Ford* v. *Surget*, 97 U. S, 617.) This was the precise situation in the Philippines.

It is suggested that this tariff was imposed and collected in violation of due process of law. If the supposed illegality can not be brought within any closer or sharper grasp than that principle gives here, the complaints must disappear in thin air. If the acts of the President were valid, as we insist, upon the principles which we have discussed, then everything that was done was done in accordance with due process of law.

An assigment of error in the *Lincoln case* (No. V, Rec., p. 18) appeals to the provision of the Constitution which forbids a tax on articles exported from any State, but that contention was finally disposed of in *Dooley* v. *United States*, 183 U. S., 151 ("*The Second Dooley* case").

I submit that the duties involved were validly imposed as an exercise of the war power, as a condition for the privilege of trading with territory occupied by our forces in the prosecution of a war, as a means of securing revenue for military expenses and for the cost of administration of civil government, as an exercise of the legislative power of the executive engaged in war, which was authorized, ratified, and

confirmed by Congress. I submit that no reasonable doubt can remain that the exactions complained of were constitutional and legal in all respects.

HENRY M. HOYT,
Solicitor-General.

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